

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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Rate Adjustment Due to Extraordinary  
Or Exceptional Circumstances

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Docket No. R2010-4(R)

INITIAL COMMENTS OF  
AMERICAN POSTAL WORKERS UNION, AFL-CIO  
(July 26, 2011)

On May 24, 2011, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011), denying in part and granting in part the Postal Service petition for review of the Postal Regulatory Commission's Order No. 547, entered September 30, 2010, denying the Postal Service request for an exigent rate adjustment under 39 U.S.C. 3622(d)(1)(E). The Court agreed with the Commission that Section 3622(d)(1)(E) of Title 39 requires "a causal relationship between the amount of a requested adjustment and the exigent circumstances' impact on the Postal Service."<sup>1</sup> However, the Court did not accept the Commission's interpretation of "due to" which requires "the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances."<sup>2</sup>

On July 11, 2011, this case was remanded to the Commission, and the Commission subsequently issued Order No. 757 establishing the present docket to address the "proper interpretation of 'due to' as a standard of causation in 39 U.S.C. 3622(d)(1)(E)" as required by the Court's opinion.<sup>3</sup> Commission Order No. 757 established a short timeline for receiving initial and reply comments "that address the causation standard applicable to exigent rate adjustment requests submitted under 39

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<sup>1</sup> 640 F.3d at 1264.

<sup>2</sup> 640 F.3d at 1268 (emphasis in original).

<sup>3</sup> PRC Order No. 757 at 4 (July 11, 2011).

U.S.C. 3622(d)(1)(E).”<sup>4</sup> The American Postal Workers Union, AFL-CIO (APWU) respectfully submits that the Commission should not require a close causal connection between the exigent circumstances acknowledged by the Commission and the Postal Services’ requested rate increase.

As an initial matter, we submit that the Commission should address the question whether the requested exigent increase is “due to” the exigent circumstances in this case without seeking to establish a broad rule applicable to all exigency cases. The Postal Service made a timely request for an exigent rate increase in July 2010 for rates to go into effect in April 2011. Given the Commission Order denying the requested increase, the Postal Service has not had the benefit of the extra revenue and is still facing extremely difficult financial circumstances. Relief is needed immediately; therefore, any exigent rate increase must go into effect as soon as possible. Moreover, it will be impossible to predict the circumstances of the next exigency case, much less the next ten cases. The requirement that exigent rate increases must be preceded by “extraordinary or exceptional circumstances” suggests that it would be impossible for the Commission to predict the next exigency. Establishing a causation standard in the abstract would be likely to cause more confusion, contention and delay in future exigent rate cases based on different “extraordinary or exceptional circumstances.” Thus, the PRC should precede one case at a time.

While cautioning against establishing a universal rule to be applied to all exigency cases, we nonetheless recognize that the PRC should provide the Postal Service with guidance on what is expected in future exigency cases. We submit that the Commission can provide sufficient guidance for future filings in its decision in this case without attempting to predict what future cases might look like and without seeking to create a general standard to apply in hypothetical future cases.

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<sup>4</sup> Id. (Initial Comments are due July 25, 2011 with Reply Comments due by August 1, 2011).

## **The Commission Should Not Require a Close Causal Connection between the Exigent Circumstances and the Postal Service Rate Request.**

In its remand decision, the Court of Appeals for the District of Columbia Circuit found the phrase “due to” to be ambiguous and directed the Commission to explain the “extent of causation the Commission requires the Postal Service to demonstrate between the exigent circumstance’s impact on Postal Service finances and the proposed rate increase.”<sup>5</sup> The Court reasoned that the phrase “due to” was ambiguous because there was no plain meaning “regarding the closeness of the causal connection.” The Court recognized that “due to” can properly mean “due in part to” as well as “due only to.”<sup>6</sup> For the reasons explained more fully below, the Commission should reject a strict “due only to” causation standard in this case.

Application of a strict causation standard to this case would eviscerate the exigency exception found in the Postal Accountability and Enhancement Act. It bears noting that the Court of Appeals cites multiple cases evaluating the causative standard required by the phrase “due to” and not one of these cases uses a strict nexus standard. For example, in *Adams v. Director, OWCP*, an employee who sought benefits for his disabling respiratory condition was required to show that his disability was “due to” his employment related black lung disease. 886 F.2d 818, 821 (6th Cir. 1989). In rejecting the employee’s claim, the OWCP applied a strict causation standard requiring the employee to show his black lung disease “in and of itself” caused his disability. *Id.* at 819. On appeal, the 6<sup>th</sup> Circuit Court of Appeals determined that the phrase “due to” was ambiguous but rejected the strict causation standard applied by the OWCP to deny the employee benefits. *Id.* at 821-822. The Court noted that the regulatory language at issue made no reference to the degree of causation required and did not support the OWCP’s strict “but for” standard. *Id.* The Court then concluded that the employee did not need to establish that his employment related black lung disease “in and of itself”

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<sup>5</sup> 640 F.3d at 1264.

<sup>6</sup> 640 F.3d at 1268.

caused his disability, he need only show that his disability be due at least in part to his black lung disease. *Id.*<sup>7</sup>

Likewise, in the present case, nothing in the statutory language requires or supports a “strict nexus” causation standard and therefore, it should not be required. Furthermore, implementing a strict causation standard in this case would render the exigent rate increase provision of the PAEA ineffectual.

In its Order denying the Postal Service’s exigent rate request, the Commission recognized that “the recent recession and its impact on postal volumes is an ‘extraordinary or exceptional’ circumstance.”<sup>8</sup> The Commission also recognized that the Postal Service faces a liquidity crisis which was caused in part by the prefunding requirement of retiree health benefits and acknowledges that the exigent circumstance may have contributed to this crisis. Yet it denied the increase because the Postal Service did not identify with specificity what part of the liquidity crisis can be attributed to the exigent circumstance.

The Postal Service’s financial stability has been adversely affected by several factors, one of which is without question an “extraordinary or exceptional” circumstance. In this case, the ability of the Postal Service to isolate the effects of the exigent circumstance is complicated by the fact that there are multiple causes for the Postal Service’s dire financial situation. However, from the record established in Docket No. R2010-4 it cannot be denied that the Postal Service’s current financial situation was impacted by the recent recession and resulting volume losses. Application of a strict causation standard in this case would require the Postal Service to prove precisely the losses attributable to the exigent circumstance; this burden is too high. Ironically, under a strict causation standard, the Postal Service would not be able to take advantage of the legislative “safety valve” in the form of an exigent increase because its financial difficulties are too complicated. It is precisely this sort of circumstance that the Postal Service most needs access to such a “safety valve,” but under a strict causation standard it is the time when it would have the least access to it. This would nullify the

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<sup>7</sup> See also *Kimber v. Thoikol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)(phrase “due to” is ambiguous and that interpreting the phrase as requiring a “significant” causal relationship is rational).

<sup>8</sup> PRC Order No. 547 at 50.

protections of the exigency exception of the PAEA. Therefore, in order to effectuate the exigency exception, the Commission should require a weak causative connection requiring only that the Postal Service's rate request be due in part to, or related to the exigent circumstances.

Application of a weak causation standard to this case will not allow the Postal Service to increase rates without restriction. Section 39 U.S.C. 3622(d)(1)(E) provides an additional check requiring that the increase be "reasonable, equitable and necessary." This additional standard guards against rate increases that are unreasonable or unnecessary under the circumstances, while still allowing the Postal Service the benefit of a rate increase under exigent circumstances that, like here, have clearly contributed to the Postal Service's liquidity crisis.

**The Postal Service Has Satisfied this Standard and its Exigent Rate Increase Should be Granted in Full.**

On September 30, 2011, the Postal Service liquidity crisis may reach default. The PAEA requires that the Postal Service provide 90-day notice to customers of a rate increase, meaning that the point of default will be reached before the Postal Service sees any additional revenue from an exigent rate increase. The PRC needs to move quickly.

In order to avoid unnecessary delay, the Commission should not only decide the causation standard to be used in this case, it should also immediately apply it. The Postal Service has provided significant support for its request in R2010-4, considered part of this docket by Order No. 757 and has clearly demonstrated that its current liquidity crisis and rate request is related, at least in part, to the recent recession and historical drop in mail volume. We submit that the Postal Service's request for a 5.6% increase complies with the PAEA and is "reasonable, equitable and necessary" given the current circumstances. Therefore, the Commission should permit the Postal Service to implement the exigent rate increase in full.

Respectfully submitted,

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